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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
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6 CHRISTINE A. GIULIANI,

7 Plaintiff,

8 vs.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

No. 12-cv-122-JPH

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

12 BEFORE THE COURT are cross-motions for summary judgment. ECF No.
13 14, 17. The parties have consented to proceed before a magistrate judge. ECF No.
14 6. After reviewing the administrative record and the parties' briefs, the court
15 **grants** defendant's motion for summary judgment, **ECF No. 17**.

16 **JURISDICTION**

17 Giuliani protectively applied for supplemental security income (SSI)
18 benefits and disability insurance benefits (DIB) on December 12, 2007. She
19 alleged onset as of September 30, 2006 (Tr. 39, 113-15). Benefits were denied
initially and on reconsideration (Tr. 92-97, 99-100). ALJ Louis J. Volz, III held a
hearing on August 13, 2010 (Tr. 36-57) and issued an unfavorable decision

1 October 4, 2010 (Tr. 17-27). The Appeals Council denied review on January 11,
2 2012 (Tr. 1-3). The matter is now before the Court pursuant to 42 U.S.C. § 405(g).
3 Plaintiff filed this action for judicial review on February 24, 2012. ECF No. 1, 5.

4 **STATEMENT OF FACTS**

5 The facts have been presented in the administrative hearing transcript, the
6 ALJ's decision and the briefs of the parties. They are only briefly summarized as
7 necessary to explain the court's decision.

8 Giuliani was 28 years old at onset and 32 on the date of the ALJ's decision.
9 She earned a GED and has worked as a teacher's aide, clerical office worker and
10 receptionist (Tr. 46, 53-54, 144, 152, 257). She alleges disability based on mental
11 limitations (Tr. 143).

12 **SEQUENTIAL EVALUATION PROCESS**

13 The Social Security Act (the Act) defines disability as the "inability to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
18 plaintiff shall be determined to be under a disability only if any impairments are of
19 such severity that a plaintiff is not only unable to do previous work but cannot,
20 considering plaintiff's age, education and work experiences, engage in any other
21 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423
22 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both
23 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
(9th Cir. 2001).

1 The Commissioner has established a five-step sequential evaluation process
2 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
3 one determines if the person is engaged in substantial gainful activities. If so,
4 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
5 decision maker proceeds to step two, which determines whether plaintiff has a
6 medically severe impairment or combination of impairments. 20 C.F.R. §§
404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe
impairment or combination of impairments, the disability claim is denied.

7 If the impairment is severe, the evaluation proceeds to the third step, which
8 compares plaintiff's impairment with a number of listed impairments
9 acknowledged by the Commissioner to be so severe as to preclude substantial
10 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
11 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed
12 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
13 not one conclusively presumed to be disabling, the evaluation proceeds to the
14 fourth step, which determines whether the impairment prevents plaintiff from
15 performing work which was performed in the past. If a plaintiff is able to perform
16 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
17 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
18 final step in the process determines whether plaintiff is able to perform other work
19 in the national economy in view of plaintiff's residual functional capacity, age,
education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon plaintiff to establish a *prima facie* case

1 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
2 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
3 met once plaintiff establishes that a physical or mental impairment prevents the
4 performance of previous work. The burden then shifts, at step five, to the
5 Commissioner to show that (1) plaintiff can perform other substantial gainful
6 activity and (2) a “significant number of jobs exist in the national economy” which
7 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a
10 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the
11 Commissioner’s decision, made through an ALJ, when the determination is not
12 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
13 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
14 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be
15 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
16 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial
17 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
18 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
19 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence
as a reasonable mind might accept as adequate to support a conclusion.”
Richardson v. Perales, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch
inferences and conclusions as the [Commissioner] may reasonably draw from the
evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir.
1965). On review, the Court considers the record as a whole, not just the evidence

1 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
2 22 (9th Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980).

3 It is the role of the trier of fact, not this Court, to resolve conflicts in
4 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
5 interpretation, the Court may not substitute its judgment for that of the
6 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
7 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
8 set aside if the proper legal standards were not applied in weighing the evidence
9 and making the decision. *Brawner v. Secretary of Health and Human Services*,
10 839 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support
the administrative findings, or if there is conflicting evidence that will support a
finding of either disability or nondisability, the finding of the Commissioner is
conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

11 **ALJ'S FINDINGS**

12 ALJ Volz found Giuliani was insured through December 30, 2008 (Tr. 17,
13 19). At step one, the ALJ found Giuliani did not work at SGA levels after onset on
14 September 30, 2006 (Tr. 19). At steps two and three, he found she suffers from
15 depression and anxiety, impairments that are severe but do not meet or medically
16 equal a listed impairment (Tr. 19-20). He found Giuliani can perform work at all
17 exertional levels but she suffers three moderate nonexertional limitations: in the
18 ability to work with the public, to work in coordination with or proximity to others
19 without being distracted by them and to get along with coworkers or peers without
distracting them or exhibiting behavioral extremes (Tr. 20).

The ALJ found Giuliani less than fully credible (Tr. 21), a finding she does
not challenge on appeal. At step four, relying on a vocational expert's testimony,

1 the ALJ found Giuliani is capable of performing her past work as a clerical office
2 worker (Tr. 26). Alternatively, at step five, the ALJ found there are other jobs she
3 can perform, such as hand packer and janitor/cleaner (Tr. 26-27). The ALJ
4 concluded plaintiff was not disabled from September 30, 2006 through the date of
the decision, October 4, 2010 (Tr. 27).

5 **ISSUES**

6 Giuliani alleges the ALJ should have called a medical expert and improperly
7 weighed the medical evidence. ECF No. 15 at 4-7. The Commissioner responds
8 that the ALJ was not required to expand the record by calling a medical expert, and
9 he properly weight the evidence in the record. She asks the Court to affirm. ECF
No. 18 at 1-2.

10 **DISCUSSION**

11 *A. Medical expert*

12 Giuliani alleges the ALJ should have called a medical expert to testify at the
13 hearing, specifically with respect to the step three finding that plaintiff's
14 impairments do not meet or equal a listing. She alleges her strong work history
15 combined with a voluntary hospitalization for mental problems "arguably" show a
16 "documented history of decompensation that suggests the 'B' criteria." ECF No.
17 15 at 4-5. Citing *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005), the
18 Commissioner responds that the ALJ had no duty to call a medical expert because
19 the record was adequate and not ambiguous. ECF No. 18 at 14-15. Moreover, the
Commissioner points out counsel asserted at the hearing this is a step five, not a
step three, case. Counsel stated:

1 “I think probably step five is the most appropriate, Your Honor. I don’t think
2 there’s enough clarification from some of the other treating providers to address
3 step three.” (Tr. 38).

4 The Commissioner observes that because Giuliani presented no evidence in
5 an effort to establish equivalence at step three, the ALJ had no duty to further
6 consider whether listing medical equivalency was met. ECF No. 18 at 20, 27. *See*
7 *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001). The Commissioner is correct.
8 There is no evidence showing Giuliani met or equaled a listed impairment.

9 Instead, the evidence shows Giuliani’s ability to serve as her grandmother’s
10 caregiver and to care for her two fairly hyperactive boys had markedly declined
11 from November 2008 through January 7, 2009 when Giuliani self-admitted. It was
12 noted at the time she “has suffered from mood problems since her teens” (Tr. 290).
13 The record also shows she was able to work with mood problems, having held her
14 last job for three years (Tr. 256, 318).

15 The record does not support a different step three finding.

16 *B. Incomplete hypothetical*

17 Giuliani alleges the ALJ’s hypothetical was flawed because it was based on
18 Dr. Gentile’s May 19, 2008 record review (Tr. 263-265, 267-80) instead of “the
19 new [unspecified] medical evidence.” ECF No. 15 at 6. Plaintiff may refer to the
20 voluntary psychiatric hospitalization from January 7 through January 12, 2009 (Tr.
21 287-95) or to counseling records in 2009-2010 (Tr. 298-310), but this is unclear.
22 The Commissioner observes the ALJ properly weighed all of the evidence when he
23 determined Giuliani’s RFC. ECF No. 18 at 28.

24 The Commissioner is correct.

1 The District Executive is directed to file this Order, provide copies to
2 counsel, enter judgment in favor of defendant, and **CLOSE** the file.

3 DATED this 31st day of May, 2013.

4 s/James P. Hutton

5 JAMES P. HUTTON

6 UNITED STATES MAGISTRATE JUDGE
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